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IN THE

Supreme Court of the United States

No. 47. **October Term, 1946.**

GEORGE E. HICKMAN, as Administrator of the ESTATE OF NORMAN E. HICKMAN, Deceased,

Petitioner,

v.

JOHN M. TAYLOR and GEORGE H. ANDERSON, Individually, and Trading as TAYLOR & ANDERSON TOWING AND LIGHTERAGE COMPANY,

and

BALTIMORE & OHIO RAILROAD CO.

JOHN M. TAYLOR, GEORGE H. ANDERSON and SAMUEL B. FORTENBAUGH, JR.,

Respondents.

On Writ of Certiorari to the United States Circuit Court of Appeals for the Third Circuit.

MOTION OF THE MARITIME LAW ASSOCIATION OF THE UNITED STATES FOR LEAVE TO FILE THE ANNEXED BRIEF AND TO ARGUE, AMICUS CURIAE, IN THE WITHIN CASE.

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To the Honorable, the Chief Justice and the Associate Justices of the Supreme Court of the United States:

Now comes The Maritime Law Association of the United States and respectfully moves that the Court grant leave to file the annexed brief and to argue, amicus curiae, upon the hearing of the within cause.

In accordance with paragraph 9 of Rule 27, there has been filed with the Court the written consent of Counsel

for the Respondent and the letter from Counsel for the Petitioner in which it is stated that Counsel for the Petitioner does not oppose this motion.

Respectfully submitted,

JOHN C. PRIZER, New York,
ALBERT T. GOULD, Boston,
LESLIE C. KRUSEN, Philadelphia,
D. ROGER ENGLAR, New York,
JOSEPH W. HENDERSON, Philadelphia,
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Counsel for the Maritime Law Association of the United States.

BRIEF OF THE MARITIME LAW ASSOCIATION OF THE UNITED STATES, AMICUS CURIAE.

This brief is presented on behalf of The Maritime Law Association of the United States, an Association whose membership is nation wide. Eighty-eight per cent. of the members are lawyers and judges. All are interested in the practice of maritime law. The Association has committees to confer with the Advisory Committee appointed by this Court to recommend changes in the Rules of Civil Procedure and also to confer with the judges of particular districts regarding the local rules of those districts.

It is because of the interest and concern of the members of the Association as practicing lawyers that this brief is filed in support of the decision of the Court below.

The Association is not concerned with, and this brief will not touch upon, any issues which are purely local to the present case. It will leave to discussion by the parties the question of whether the petitioner's contention is properly before the Court at this time. We are concerned only with the proper application of the Rules of Civil Procedure and the orderly administration of impartial justice. Those questions do not depend upon the narrow facts of a particular case or upon the question of whether the party seeking to invoke the rules is a plaintiff or a defendant, an individual or a corporation.

The broader issues of this cause involve every lawyer practicing in the Federal Courts and every litigant whose case is tried in those courts. The decision of the district court not only overrules its own prior decisions (Record 64a, 65a) but would effect a fundamental, far reaching change in the basic and ancient concepts which, without

challenge, have regulated the practice of law for centuries. We think it is not an exaggeration to say that the district court decision would revolutionize the ordinary every day practice of law—not only the actual practice in the courts, but the routine procedures of the law office, and the proven and long accepted methods of preparing a client's case for trial.

So far as we know it has never been held,—or even urged—that any form of pre-trial discovery could force an opposing *lawyer* (an officer of the court—not a party or witness) to testify, or reduce to writing for the convenience of his adversary, the content of *oral* communications made to him by prospective witnesses in his routine preparation of the cause for trial. However, that is the frank and avowed intent of the opinion and order of the district court, and we believe the ruling to be such a fundamental departure from the settled traditions of legal practice as vitally to affect the rights, privileges and immunities of every lawyer and litigant in the United States courts.

This brief will not contend that a party to a litigation should be denied access to evidence and facts within the control or knowledge of an adverse party. The rules were drawn for the purpose of making evidence and facts available and have, in the past, been applied with commendable liberality to accomplish that purpose. They have proved very useful in simplifying issues and in promoting justice. The disclosures which the respondent's lawyer is called upon by petitioner to make in the present case, however, are neither evidence nor are they facts. Petitioner seeks to reach the private records and recollection of a lawyer with respect to the work that he has done to date in the investigation of a case and in its preparation for trial.

Point. 1.

The Rules of Civil Procedure Do Not Authorize an Order Upon the Attorney for a Party Requiring Him to Produce for Examination Before Trial His Private Memoranda, Statements, Notes and Recollections.

The Petitioner suggests that the particular rules involved in this argument are Nos. 26, 33 and 34 (Petitioner's Brief, page 11). The District Court treated the question as if all three rules were involved, but the opinion of the Circuit Court of Appeals, six judges sitting, pointed out some of the inherent differences between the three rules.

We will not set out here the full text of the three rules. We will call to the attention of the Court the distinct fields in which each operates. Rule 26, sub-section (2), provides in brief, that a party may take the deposition of any person, whether a party or not, for the purpose of discovery or for use as evidence. The attendance of witnesses may be compelled by subpoena. Subsection (b) of Rule 26 is concerned with the scope of the examination and provides that the deponent may be examined regarding any matter, not privileged, which is relative to the subject matter and including the existence, description, nature, custody, condition and location of any books, documents or other tangible needs and the identity and location of persons having knowledge of relative facts.

Rule 33 provides that any party may serve written interrogations upon any adverse party.

Rule 34 provides that upon motion of any party showing good cause, the Court may order any party to produce and permit the inspection and copying or photographing of any designated documents, papers, books, accounts, letters, photographs, objects or tangible needs, not privileged, which constitute or contain evidence material to any matter involved in the action.

Rule 26 was intended to be, and in practice is, of great value to any party, plaintiff or defendant, individual or

corporate, rich or poor, who is at a disadvantage in locating and obtaining information. Not only adverse parties may be called, but any other person may be examined under oath and attendance compelled by subpoena. The rule is a two-edged sword and is limited only by privilege and the requirement that the examination be confined to matter which is relevant to the subject matter involved in the pending action, Rule 26 is a potent weapon. Its purpose is to give to any party the right to obtain facts necessary or helpful to the presentation of his claim or defense. It would serve no useful purpose and would, in the end, obstruct justice to require a lawyer who has no personal knowledge of the facts giving rise to the cause of action, to disclose his writings, his rough notes or memoranda and his personal recollection as to what persons purporting to have knowledge of the facts had indicated to him in interviews which he may have had with them.

Rule 33 applies by its terms only to parties and not to counsel for the parties. A lawyer's private memoranda and personal recollection in connection with his work upon a particular case are peculiarly personal in character and it would be a forced construction, indeed, which would require such personal data to be produced by the lawyer under a rule which provides that interrogatories may be addressed to a *party*.

Rule 34 is the only discovery rule designed to govern the production for inspection of documents, papers, books, etc. The rule specifically requires that the Court may direct an order under Rule 34 to *any party*. The rule is equally clear that the papers which may be called for under Rule 34 are those "which *constitute or contain evidence* material to any matter involving the action." (Italics ours.)

We are unable to subscribe to the view that under Rule 34 a lawyer, who is not a party to the action, could be required to produce his private memoranda which contained references to or notes concerning his conversations with other persons, whether they be the client or merely a wit-

ness having knowledge of the facts. It is the Petitioner's contention in the present case that under Rule 33, or perhaps Rule 34 or 26, he is entitled to demand from counsel for one of the other parties, complete disclosure of that lawyer's work done in preparation for trial. The contention is certainly novel. The Rules of Civil Procedure have been in force in the United States District Courts since 1938 and never in the intervening years, to our knowledge, has anyone sought to carry the discovery procedure so far. If it had been within the contemplation of the Advisory Committee and of this Court in promulgating the rules that this could be done, it seems to us that the contention would have been made before this case arose. In a large number of cases, the Courts, in the exercise of their discretion, have refused to require *a party* to produce statements and memoranda procured in preparation of the case for trial. *Caraballo v. Export Steamship Corp.*, Fed. Rules Serv. Col. 3, p. 387 (S. D., N. Y.); *Piorkowski v. Socony Vacuum Oil Co.*, Fed. Rules Serv. Vol. 4, p. 534 (M. D., Pa.); *Courteau v. Interlake Steamship Co.*, Fed. Rules Serv. Vol. 4, p. 546 (W. D., Mich.); *Nelson v. Reid*, 4 Fed. Rules Serv. Vol. 4, p. 546; *Kenealy v. Texas Co.*, 29 F. Supp. 502; *Barwick v. Powell*, Fed. Rules Serv. Vol. 4, p. 548 (S. D., N. Y.); *Revheim v. Merritt-Chapman & Scott Corporation*, 2 F. R. D. 361; Fed. Rules Serv. Vol. 6, p. 540; *Poppino v. Jones Store Co.*, 1 F. R. D. 215; *Rose Silk Mills, Inc. v. Insurance Co. of North America*, 29 F. Supp. 504; *Schweinert v. Insurance Co. of North America*, Fed. Rules Serv. Vol. 3, 26b. 211, Case 2. In a line of cases of which *Condry v. Buckeye S. S. Co.*, 4 F. R. D. 316; 8 Fed. Rules Serv. 34.11-5 (W. D., Pa.) is an example, it has been held that such statements need not be produced because they are not "evidence". This we think is a sound view in the light of the language used by the Advisory Committee and this Court in framing the rules.

The language of Rule 34 differs from that used in Rule 26. Rule 34 provides for the production of documents.

Under Rule 26, the deponent may be examined regarding any matter, not privileged, which is relevant. Rule 34 provides for the production of documents which constitute or contain evidence. There is a distinction in the language used and if that was not accidental is made rather clear by an analysis of the development of the rules. The following quotation illustrates this.

> "Historically, discovery of documents has generally been limited to matters admissible in evidence. Old Equity Rule 58, the predecessor of Rule 34, referred to documents 'containing evidence material to the cause of action or defense', and this was interpreted to permit discovery only of admissible matters. Maywood v. Texas Co., 17 F. (2d) 490 (N. D. Tex. 1927); Finance Co. of America v. Brock, 80 F. (2d) 713 (C. C. A. 5th, 1936). A leading New York decision by Chief Judge Cardozo laid down the rule that 'Documents to be subject to inspection must be evidence themselves,' People ex rel Lemon v. Supreme Court, 245 N. Y. 24, 156 N. E. 84 (1927), and other state cases have adopted a similar view. City Nat. Bank v. Wofford, 189 Ark. 914, 75 S. W. (2d) 666 (1934); Travelers Ins. Co. v. Jackson, 201 Iowa 43, 206 N. W. 98 (1925); Miller v. New England Mut. L. I. Co., 14 N. Y. S. (2d) 129 (1939); Marx v. Merchants Nat. Properties, Inc., 148 Misc. 6, 265 N. Y. Supp. 163 (1933). Whatever may have been the reasons for it, this tendency was undoubtedly known to the members of the Advisory Committee in drafting Rule 34, and if they had intended to liberalize the rule they could have used less restrictive language. In fact, the history of the rule indicates that a broader scope of discovery was contemplated but decided against. The first draft of the rule would have permitted discovery of documents, etc., 'relevant to any matter involved in the action'—almost the exact language of present Rule 26b. Preliminary Draft (May, 1936) Rule 38. In the final draft, however, the present wording was substituted.

It hardly seems reasonable to suppose that the draftsmen intended Rules 26 b and 34 to be construed alike when different terminology was deliberately employed." Commentary, Federal Rules Service, Vol. 4, page 919 at 921.

Viewed in the light of historical development and the difference in the language used, it seems clear that it was never the intention of the rules to require an attorney to disclose the data and memoranda obtained and made by him in performing his duty for his client.

Point 2.

To Permit Discovery to Go Beyond the Limits Set by the Circuit Court of Appeals Would Only Confuse the Issues and Obstruct the Proper Administrtaion of Justice.

In the Petitioner's brief, the lawyer's statements, notes and memoranda are treated and referred to as if they and their contents constituted the facts of the case. Actually, a simple analysis will show that they are neither factual or evidentiary. The notes of counsel and other material which the District Court ordered produced are the merest hearsay. Even the written statement prepared by the lawyer and signed by the witness would not and could not be a fact in the case. To require the lawyer to turn over to the adverse party his notes of his conversations with a witness would not advance the adversary's knowledge of the facts or simplify the issues to be presented to the jury. It would, on the contrary, confuse the real issues in the case to permit a witness to be cross-examined concerning a set of notes which represent some other person's recollection of a conversation with the witness weeks or even months before. Either the witness or the lawyer would be placed in a false light. We submit that this is neither necessary nor desirable and that it was never the intention of the discovery rules to bring about such a situation.

Unless we are to abandon the Anglo-Saxon Common Law system and adopt the Continental System of Civil Law, the mere statements of witnesses are not evidence. They are not even the facts of the case. The Common Law system provides for the oral testimony of witnesses upon direct and cross-examination. Even such testimony is not of itself fact. It is rather the best system yet evolved for ascertaining facts which are not physically demonstrable. An original contract, a book of original entries, a report in the usual course of business, a broken piece of machinery and many other things are themselves factual and evidentiary. If they are relevant to the controversy, they become evidence upon identification.

The notes, statements and memoranda which the lawyer makes in preparation of his client's case are essentially different. During preparation, the lawyer is engaged in assembling information. He then weighs it against the applicable law and forms an opinion which is the basis for his recommendation to his client. He is a lawyer during that process just as much as he is a lawyer when he steps to the Bar of the Court to argue his client's case. It is one of his duties as a lawyer to investigate and sift out the facts of the case. One of the accepted ways of doing so is by means of interviewing witnesses and recording the information obtained. The interviews of the lawyer with the alleged witness seldom take place under ideal conditions. Haste on the part of the lawyer or the witness may prevent detailed covering of the facts. Seldom if ever is the person supplying the information placed under oath. The like or dislike of the witness for one of the parties and the universal desire to avoid becoming enmeshed in some other person's case often make it impossible for the lawyer to obtain a complete or clear picture at the first, and sometimes in subsequent, interviews. It is sometimes true that the witness has had one drink too many to enable him to give a rational account of events. It is often the case that, for lack of information on the part of the lawyer, a whole avenue of information is not developed at the interview

with a prospective witness. A lawyer may reject the recital of facts by a particular witness on the ground that they are in conflict with the incontrovertible physical facts. Is his client to be put in the position at the time of trial of explaining away the failure to call such a witness to testify, or of explaining a superficial inconsistency between a prior statement and the testimony of the witness? Does it not then become necessary for the lawyer to become a witness in the case?

The issues in the case are not as simple as the petitioner's brief would indicate. It is not a question of the rich and the poor, the individual and the corporation. The Court is here being asked to set up a rule which will apply to all litigants and all lawyers. The fact that the party seeking discovery in this case is the administrator of the estate of a seaman is not dispositive of the broader issues of the case. More frequently in practice it would be the indivdual who would be subjected to unlimited discovery by the wealthier adversary who had unlimited means to expend for discovery. It is true that some corporations have complete claims departments for investigatory purposes. It is equally true that the individual who is involved in litigation must rely entirely upon his lawyer to develop the information necessary for him to proceed. He is not sufficiently experienced to investigate his own case. There is, therefore, no sound reason for the argument of individual versus corporation when it pertains to the files of counsel.

It seems to us that the proper approach to discovery is that it was intended to enable one party to know what facts his opponent relied upon as the basis of his claim or defense. If the case resolved itself into a question of law, discovery was not intended to permit one lawyer to develop the other lawyer's points of law nor the cases upon which he relied. If one party did not know certain facts or the names of witnesses, discovery would at least put him on an equal footing in the search for facts. Discovery

was never intended, we submit, to enable one party to find out what his adversary knew about the case or thought the facts to be. Still less was it intended as a means of learning what had been said to opposing counsel by someone having knowledge of the facts. If facts were the objective, then the development of facts must be the line of limitation beyond which discovery may not legitimately go.

Point 3.

The History of Discovery Procedure.

The discovery process in those countries applying the English common law system, as contrasted with the continental system of civil law, probably had its beginning in the English Rules under the Judicature Act (1873), O. 31, RRI-29. The English rules have been developed through the judicial process ever since that time. The English authorities on the subject of discovery indicate that four rather definite grounds of "privilege" have been developed and include the doctrine of "legal professional privilege." See Bray—Digest of the Law of Discovery with Practice Notes (2nd Ed.). In the United States, the practice in most of the States has developed discovery in some form. This has been done either by statutory enactment or rules of Court, although some States still require that a separate proceeding in equity be commenced where discovery is necessary. See Ragland—Discovery Before Trial. When the Advisory Committee submitted to this Court the proposed draft of the Federal Rules of Civil Procedure, the comments of the Committee would indicate that it was the intention that the rules should follow the practice which had already been tried and tested in England and in some of the States. The comment of the Committee with respect to Rule 34, for example, reads as follows:

> "In England orders are made for the inspection of documents, English Rules Under the Judicature Act (The Annual Practice, 1937) O. 31, 4. 4. 14, et seq., or

for the inspection of tangible property or for entry upon land, O. 50, 4. 3. Michigan provides for inspection of damaged property when such damage is the ground of the action. Mich. Court Rules Ann. (Searl, 1933) Rule 41, Sec. 2.

Practically all states have statutes authorizing the court to order parties in possession or control of documents to permit other parties to inspect and copy them before trial. See Ragland, Discovery Before Trial (1932), Appendix, p. 267, setting out the statutes.

Compare Equity Rule 58 (Discovery—Interrogatories—Inspection and Production of Documents—Admission of Execution or Genuineness) (fifth paragraph)."

The comment of the Advisory Committee would certainly indicate to anyone examining it that our statement above is correct. This is borne out by a statement made by Edson R. Sunderland, a member of the Advisory Committe, who, we are informed, has had a great deal to do with the rules pertaining to discovery. Mr. Sunderland spoke at an institute conducted under the auspices of the American Bar Association at Cleveland, Ohio, in July, 1938. At one point Mr. Sunderland states: "Rule 34 provides for discovery of documents and other tangible things. This can be had only upon the Court's order, and a mere motion is insufficient." At another point in the same discussion, p. 282 of the volume entitled "Federal Rules of Civil Procedure and Proceedings of the American Bar Association Institute, Cleveland, 1928," Mr. Sunderland is quoted as follows:

"That was the situation that the Advisory Committee had to deal with—practically no discovery in the federal courts, and every variety both of liberality and restriction among the various states and in the English jurisdictions. *And I think it can be said that every type of discovery which has been authorized in*

> *these rules is a type of discovery which has been in successful operation somewhere."* (Italics ours.)

If it was the intention of the Advisory Committee to adopt a discovery practice which had been in successful operation somewhere, then it can scarcely be said that it was the intention of the Committee to allow discovery such as is sought in the case at bar. Our research has failed to disclose any jurisdiction which, under the guise of discovery, would permit one party to litigation to obtain statements and information gathered by an attorney in preparation of his client's case. We very much doubt that the Petitioner can point to any system of practice in any of the States which goes beyond the doctrine which has been enunciated by the six Judges of the Circuit Court of Appeals in this case. If it is true that the Advisory Committee, as its comment to Rule 34 and the above statements by one of its members would indicate, was guided by the English discovery practice and that which theretofore had existed in one or more of the States or under the old equity rules, then we think its intent at the time of drafting the rules is clear.

The question of the limit which shall be allowed for discovery of papers and documents prepared solely by reason of the fact that litigation is pending has caused the Advisory Committee much difficulty. The second preliminary draft of proposed amendments (May, 1945) provided for an amendment to Rule 30 (b), as follows:

> "The Court in which the action is pending may make an order . . . that designated restrictions be imposed upon inquiry into papers and documents prepared or obtained by the adverse party in the preparation of the case for trial."

The comment of the Committee upon this proposed change is very interesting and emphasizes one of the important reasons why this brief is before the Court. The comment reads as follows:

> ". . . it may be possible to state some general standard to carry out the idea that in exercising its discretion the Court shall forbid the inquiring into matters which, if obtained, might be the subject of abuse and which, if obtained, are of no great value to the party making the inquiry if the material is legitimately used."

The Committee apparently admits that the discovery problem has not been satisfactorily solved. The third draft of proposed amendment published by the Committee in June, 1946, attacks the problem from a different angle than that which had been attempted in the second draft. The approach of the Committee is, however, negative in character. The amendment to rule 30 (b) as now proposed reads:

> "The Court shall not order the production or inspection of any writing obtained or prepared by the adverse party, his attorney, surety, indemnitor, or agent in anticipation of litigation, or in preparation for trial unless satisfied that denial of production or inspection will unfairly prejudice the party seeking the production . . ."

We understand that in answers to interrogatories filed earlier in this case, the names and addresses of all of the witnesses who were known to the Defendants were made available to the Plaintiff. We presume that no one will question the statement that under the clear language of Rule 26, the Petitioner could have proceeded to examine these witnesses by depositions, either orally or upon written interrogatories. Rule 26 is implemented by Rule 45 which would have enabled the Petitioner to have compelled the attendance of the witnesses, who could then have been sworn and compelled to divulge all of the factual information they possessed, under oath. The record here does not reveal that any such attempt was ever made. Whether or not the Petitioner, his counsel, or any one acting for

them ever attempted to interview these witnesses informally does not, of course, appear in this record. Certainly there is nothing which would have prevented such procedure. We urge that the Petitioner has not exhausted the remedies which are made available to him under the other rules of the discovery procedure and that no good reason has been shown for an extreme interpretation of the rules which would compel the attorney for one of the parties to turn over to the Petitioner and his counsel those written statements which he made during his interviews with prospective witnesses and compel the same counsel to reduce to writing his mental impressions so that the Petitioner may have the benefit of them. If it were not for the extreme interpretation which the Petitioner urges upon this Court, there would not be the universal interest among lawyers in this particular case. That interest only arises because the lawyer sees himself becoming enmeshed in the controversies of his clients to the extent that the personal data which he has obtained in order that he may properly perform his function as an attorney may now be thrown open to inspection by other lawyers and their clients and may even find its way to becoming a part of the public records of the United States District Court. The concept of that possibility is completely foreign to the traditional function of the attorney.

The discovery practice under the Admiralty Rules has operated satisfactorily in the United States District Courts for many years. Admiralty practice in our country has been characterized by informality and the refusal to permit the defeat of substantial justice by technicalities. The Supreme Court Admiralty Rules contain provisions for interrogatories and for the production of documents similar to the Rules of Civil Procedure (see Admiralty Rule 31 relative to interrogatories and Admiralty Rule 32 relative to the production of documents). An examination of the history of the present Rules of Civil Procedure will show that the admiralty practice served as one of the guides which the Advisory Committee followed. Under a liberal

application of the Admiralty Rules records and reports made in the usual course of business of a party, log books, repair bills, stowage plans, blueprints of vessels, photographs and like tangible things have been required to be produced and have proved properly helpful to the adverse party. Such documents are all factual as are the names and addresses of probable witnesses. Neither libellants nor respondents in the admiralty practice have found it necessary to contend that the opposing proctors' preparations for trial need be disclosed in order to prevent surprise or otherwise accomplish justice between the parties. It seems to us probable that the successful operation of the informal and liberal admiralty practice influenced the framers of the present civil rules.

Point 4.

The Discovery Provisions of the Rules Should Not Be So Construed as to Defeat the Other Purposes of the Rules.

Rule 1 of the Federal Rules of Civil Procedure provides, inter alia, that: "They (the Rules) shall be construed to secure the just, speedy, and inexpensive determination of every action." We take a practical approach to the problem. There are two potential discovery problems in every action which is brought to issue. The number of cases brought in the District Courts has increased and the discovery procedure is coming into more general use by all lawyers. If the discovery process is to be enlarged beyond the bounds which have heretofore encompassed it, the result will be to bog down the judicial process and prevent "the speedy and inexpensive determination of every action." In the case at bar, the opinion and order of the District Court indicated that the Court would examine Mr. Fortenbaugh's papers and memoranda and "sift out" those matters which it did not consider proper for discovery. In *United States v. Aluminum Company of America, et al.*, 26 Fed. Supp. 711 at 713, the Court said, with respect to discovery of documents,

> "I conclude, therefore, that it is essential that I examine every document before determining, and that by such examination I determine, whether it may properly be inspected by the government."

In that case, the Court had to examine 87 documents and only 28 were permitted to be examined by counsel for the government.

From the standpoint of the lawyer and client in such cases, the expense and time required are increased enormously. It is entirely possible that the client who cannot afford protracted litigation would find his case so encumbered with discovery proceedings instigated by his more affluent adversary that justice would be defeated.

Point 5.
The Constitutional Question.

The Circuit Court of Appeals did not pass upon any question of constitutionality in reaching its decision in this case. It seems to us that a constitutional question is necessarily presented. Our belief in this regard is strengthened by the provision of the Enabling Act, Act of June 19, 1934, c. 651, Sec. 1, 28 U. S. C. A. 723b, which provided, in part, that ". . . said rules shall neither abridge, enlarge, nor modify the substantive rights of any litigant." The Fourth and Fifth Amendments to the Constitution, although not necessarily in "pari materia", supplement each other in the protection they give to the rights of the individual. The part of the Fourth Amendment which is pertinent to these proceedings is the clause which reads:

> "The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated . . ."

Under Petitioner's contention, a serious constitutional question arises under the unreasonable search and seizure provision of the Fourth Amendment. As Rule 34 was written, it presents no constitutional question since its very

language provides for a showing of good cause before an order will issue for the production of a document. The decision of the District Court in the case at bar struck down that good cause requirement of Rule 34 and in so doing we submit that it ignored the rights guaranteed by the Fourth Amendment.

There is no decided case which our research has disclosed covering the same facts as those in the case at bar. Similar problems, however, have arisen and have been the subject of consideration and decision by this Court. In *Federal Trade Commission v. American Tobacco Co.*, 264 U. S. 298; 44 S. Ct. 336, a mandamus proceeding was instituted by the Federal Trade Commission to compel production by the defendant of certain correspondence and records. The Federal Trade Commission claimed that its broad investigatory powers under Compiled Statute, Secs. 8836e and 8836f, entitled it to the relief sought. This Court, speaking through Mr. Justice Holmes, held:

> "Anyone who respects the spirit as well as the letter of the Fourth Amendment would be loath to believe that Congress intended to authorize one of its subordinate agencies to sweep all our traditions into the fire (Interstate Commerce Commission v. Brimson, 154 U. S. 447, 479, 14 Sup. Ct. 1125, 38 L. Ed. 1047), and to direct fishing expeditions into private papers on the possibility that they may disclose evidence of crime. *We do not discuss the qustion whether it could do so if it tried, as nothing short of the most explicit language would induce us to attribute to Congress that intent.*" (Italics ours.)
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> "We have considered this case on the general claim of authority put forward by the Commission. The argument for the Government attaches some force to the investigations and proceedings upon which the Commission had entered. The investigations and complaints seem to have been only on hearsay or sus-

picion—but even if they were induced by substantial evidence under oath the rudimentary principles of justice that we have laid down would apply. We cannot attribute to Congress an intent to defy the Fourth Amendment or even to come so near to doing so as to raise a serious question of constitutional law. United States v. Delaware & Hudson Co., 213 U. S. 366, 408, 29 Sup. Ct. 527, 53 L. Ed. 836. United States v. Jin Fuey Moy, 241 U. S. 394, 401, 36 Sup. Ct. 658, 60 L. Ed. 1061, Ann. Cas. 1917D, 854."

Certainly the Rules of Civil Procedure can and do not go further than the statutory authority granted to the Federal Trade Commission. What has already been said by this Court with respect to the one is equally applicable to the other.

The language of the Fifth Amendment which may also be pertinent here under Petitioner's view is that which reads:

". . . nor be deprived of life, liberty or property without due process of law, . . . ".

Modern concepts of property have enlarged property rights beyond those which were known to the framers of the Constitution. A man may now refer to his property right in intellectual production. *Cf. Waring v. W. D. A. S. Broadcasting Station, Inc.*, 327 Pa. 433, 194 Atl. 631. Under the modern and more liberal concepts of property, the lawyer should be granted property right in the product of "his tongue, his pen and his head", which should not be taken from him without due process of law.

Point 6.

The Doctrine of Privilege Was Properly Applied by the Circuit Court of Appeals.

The Circuit Court of Appeals was right in recognizing that the word "privileged", when used in a different context, has a meaning broader than the narrow American

testimonial exclusion. The doctrine of privileged communication was developed as a part of the law of evidence. As such, it is fully discussed in the Petitioner's brief. That discussion, however, is confined to the meaning of the word as it is used in the law of evidence. The same word can be used to convey a much broader or an entirely different meaning, depending upon the circumstances of its use. In footnote 16 to the Opinion of the Circuit Court of Appeals in this case, there are illustrations and citations where the term "privileged" has been extended to other situations. In addition to those, we suggest to the Court that privilege has additional meanings as it applies to the physician, the priest or the marital relationship. There is a sound logic behind the view taken by the Circuit Court of Appeals that public policy requires the cloak of privilege to be extended to the lawyer when he is acting for a client in preparation for the trial of litigation.

The Circuit Court of Appeals has given one illustration of the situation which might arise if the privilege of the attorney is not recognized. As the Circuit Court of Appeals notes, the possible conflict with the canons of ethics might put it within the power of one party to make use of the discovery proceedings in such a way as to "get rid of a dangerous adversary". Another very practical reason is that in cases tried before a jury, the calling of a lawyer to the stand to testify and, perhaps, contradict something that has been said by a witness would only serve to confuse the issues.

The Advisory Committee of this Court has, in the proposed amendments to the Rules, now reached the same result as was reached by the Circuit Court of Appeals in the case at bar. Perhaps one of the problems which the Committee found it difficult to solve was that which it refers to in the note above cited from the second preliminary draft. We refer to the reference made by the Committee to the *legitimate* use of the material obtained upon discovery. (*Supra*, p. 15.)

We do not believe that the Rules of Court should place in the hands of an unscrupulous attorney, or the unscrupulous client of an honest attorney, an instrumentality whereby he may ascertain in advance the evidence to be presented by his adversary and then shape his own case so as to meet it. Such a weapon is too easily the subject of abuse. Cf. *Benbow v. Low*, 16 Ch. D. 93, 95 (Opinion by Jessel, M. R.).

Conclusion.

For all of the reasons set forth in this brief, we urge upon this Court the view that the result reached by the Circuit Court of Appeals is correct. We go further in finding reasons to support not only the reasoning but the result. The Circuit Court has applied to discovery proceedings in the Federal Courts the same limitations which have been reached in England after years of interpretation and modification. We think it worthy of note that the rule for which we here contend is in accord with a host of decisions in the Federal District Courts and is the same rule which operated successfully for several years in the Eastern District of Pennsylvania under the decision in *Stark v. American Dredging Co.*, 3 F. R. D. 300.

We take the position that the rules do not justify the result reached by the District Court. As the Circuit Court of Appeals points out, a lawyer should never be placed in the position where he might be called as a witness not only for, but possibly against his client. Such a concept is entirely foreign to the function, tradition and code of ethics of the lawyer. We do not urge any curtailment in the disclosure of facts under discovery, but we point out to the Court the possible abuses which are inherent in any system which would permit one party to discover the degree of preparation of his adversary's case. With respect to the latter term, may we point out to the court what we consider to be an unfair reference to a statement made by George Wharton Pepper, Vice-Chairman of the Advis-

ory Committee, at a symposium held on June 21, 1946, at the Ninth Annual Judicial Conference of the Third Judicial Circuit. We refer to the statements on page 32 of Petitioner's brief. The entire proceedings are reported at 5 Federal Rules Decisions 403 (Advance Sheets for September, 1946.) The stenographic record of Mr. Pepper's remarks appears on page 404. We think that a fair reading of them does not warrant the observations concerning them which have been made in the Petitioner's brief.

We are concerned not only with the position of the lawyer under unlimited discovery. The client whose adversary is making a false claim or defense is put into a precarious and unfair position. The party guilty of the fraud can, through discovery, ascertain in advance just how far he can press his false claim or defense with impunity. We are not convinced that the benefits for which the petitioner argues are sufficient when they are weighed against the legitimate uses which could be made of the memoranda of counsel in preparing his client's case for trial. As the Advisory Committee pointed out, the legitimate use of such discovery is questionable. If abused, the damage would far outweigh the gain. We agree that the lawyer does not "make the facts of a case". By the same token, the knowledge which a lawyer does or does not have is not one of the facts in the case if the game is being played with all cards on the table.

The disclosure here sought would make the information in a lawyer's files available not only to opposing counsel but to the parties in interest and perhaps even to the witnesses on the other side. Until human nature changes there is nothing which can prevent the dishonest or unscrupulous witness or party from shaping his testimony to meet the evidence of the other side. That is not the "sporting theory of justice", it is the perversion of the judicial process. No party, whether plaintiff or defendant, can protect himself from such a practice. It is therefore respectfully submitted that there is a question of privilege

involved in this case which stems from considerations of sound public policy and the necessity to maintain a high standard in the conduct of judicial proceedings. We urge this Court to recognize and uphold the concept that a lawyer is an officer of the Court in accordance with his oath and that no rule of court should be so construed as to make him a participant in a case where his proper duties require only that he be an advocate.

Respectfully submitted,

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